(2)

AUG
OFFICE

NO. 93-184

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

REX ALLEN JERNIGAN AND ROSE B. JERNIGAN

Petitioners

VERSUS

ASHLAND OIL, INC., ASHLAND PIPE LINE CO. AND DRILLED CROSSINGS, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, ASHLAND OIL, INC., ASHLAND PIPE LINE CO. AND DRILLED CROSSINGS, INC.

PATRICK A. JUNEAU - 7594
JUNEAU, JUDICE, HILL & ADLEY
(A Professional Law Corporation)
926 Coolidge Boulevard
Post Office Drawer 51769
Lafayette, LA 70505-1769
Telephone: (318) 235-2405

COUNSEL FOR ASHLAND OIL, INC., ASHLAND PIPE LINE CO. AND DRILLED CROSSINGS, INC.

Defendants/Respondents

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES AND CITATIONS ii

RULE 29 STATEMENT. iv

STATEMENT OF THE CASE. 1

ARGUMENT 6

CONCLUSION 20

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES AND CITATIONS

CASES

Bradford v. Village Insurance Company, 548 So.2d 106 (La. App. 2nd Cir. 1989) 17

Cook v. Pep Boys, 641 F.Supp. 43 (E.D. La. 1985) 19

Dodson v. Spiliada Maritime Corporation, 951 F.2d 40 (5th Cir. 1992) 9

Guillory v. Bill Decote, 509 So.2d 455 (La. App. 3rd Cir. 1987), writ denied, 510 So.2d 376 (La. 1987) 15

Hensgens v. Deere & Company, 833 F.2d 1179, 1181 (5th Cir. 1987). 19

Juris v. Llama Drilling Company, Inc., 457 So.2d 135 (La. App. 2nd Cir. 1984); writ denied, 460 So.2d 1045 (La. 1984). . .17

Massey v. Century Ready Mix Corp., 552 So.2d 565 (La. App. 2nd Cir. 1989) 17

Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875 (1st Cir. 1983) 6, 20

STATUTES

LSA-R.S. 23:1032(A)(1)(a). 13

LSA-R.S. 23:1032(A)(1)(b). 14

TABLE OF AUTHORITIES AND CITATIONS (CONT.)

TREATISES

1A J. Moore, Moores Federal Practice §§0.161[1-1] at nn. 23 & 25, 0.161[2], 0.168[3-2-2]. 20

Wright, Miller & Cooper, 14A Federal Practice & Procedure, §3732 . . . 19

RULE 29 STATEMENT

The following is a list of all parent companies and subsidiaries of Ashland Oil, Inc., Ashland Pipe Line Company and Drilled Crossings, Inc.:

1. A O I Finance, Inc.
2. Adgraphics, Inc.
3. APAC Holdings, Inc.
4. APAC-Alabama, Inc.
5. APAC-Arizona, Inc.
6. APAC-Arkansas, Inc.
7. APAC-Carolina, Inc.
8. APAC-Florida, Inc.
9. APAC-Georgia, Inc.
10. APAC-Kansas, Inc.
11. APAC-Kentucky, Inc.
12. APAC-Mississippi, Inc.
13. APAC-Oklahoma, Inc.
14. APAC-Tennessee, Inc.

15. APAC-Texas, Inc.

16. APAC-Virginia, Inc.

17. APAC, Inc.

18. Archbald Holdings, Inc.

19. Archbald Power Corporation

20. Ash Property, Inc.

21. Ashchem I.P., Inc.

22. Ashcorp Five, Inc.

23. Ashland (Oman) Company

24. Ashland Branded Marketing, Inc.

25. Ashland Chemical (N.Z.) Inc.

26. Ashland Chemical Canada Ltd.

27. Ashland Chemical Italiana S.P.A.

28. Ashland Chemical Ltd.

29. Ashland Chemical Saudi Holdings, Inc.

30. Ashland Chemical, Inc.

31. Ashland Composite Polymers International, Inc.

32. Ashland Composite Polymers Limited

33. Ashland Construction Communications Company

34. Ashland Crude Marketing, Inc.

35. Ashland Crude Trading, Inc.

36. Ashland Development, Inc.

37. Ashland Electronic Products, Inc.

38. Ashland Engineering & Construction Holdings, Inc.

39. Ashland Enterprise One, Inc.

40. Ashland Ethanol, Inc.

41. Ashland Exploration Australia PTY, Ltd.

42. Ashland Exploration Holdings, Inc.

43. Ashland Exploration International, Inc.

44. Ashland Exploration Italia S.R.L.

45. Ashland Exploration Maroc Limited

46. Ashland Exploration Nigeria, Inc.

47. Ashland Exploration, Inc.

48. Ashland Export Company, Inc.

49. Ashland Foundry International, Inc.

50. Ashland Gas Marketing, Inc.

51. Ashland Korea Foundry Products, Limited

52. Ashland Nigerian Development Company

53. Ashland of Nigeria, Ltd.

54. Ashland Oil (Nigeria) Company Ultd.
55. Ashland Oil & Refining Company
56. Ashland Oil Enterprises, Inc.
57. Ashland Oil Holdings, Inc.
58. Ashland Oil International Limited
59. Ashland Oil Nederland B.V.
60. Ashland Overseas Investments, Inc.
61. Ashland Pacific PTY, Ltd.
62. Ashland Participacoes Ltda.
63. Ashland Petroleum, Inc.
64. Ashland Pipe Line Company
65. Ashland Plastics (UK) Limited
66. Ashland Plastics Australia PTY. Ltd.
67. Ashland Plastics Benelux B.V.
68. Ashland Plastics De Mexico S.A. De C.V.
69. Ashland Plastics France S.A.
70. Ashland Plastics International, Inc.
71. Ashland Plastics Ireland Limited
72. Ashland Plastics New Zealand Limited
73. Ashland Resimas Simtettcas Ltda.

74. Ashland Services Company

75. Ashland Specialty Polymers and Adhesives International, Inc.

76. Ashland Sud-Chemie Giesserei-Chemikalien GNBH

77. Ashland Synthetic Fuels, Inc.

78. Ashland-Avebene S.A.

79. Ashland-Sudchemie-Kernfest GNBH

80. Ashmont Insurance Company, Inc.

81. ATA Construction Company

82. ATEC, Inc.

83. B. V. Ashland-Suedchemie V.M. Necof

84. Barnes Transportation Company, Inc.

85. Berwyn Chemicals, Inc.

86. Birch Bru, Inc.

87. Blanton Marine Corp.

88. Bluegrass Insurance Company Limited

89. Bluegrass International Insurance Limited

90. Cogdo, Inc.

91. CLTA, Inc.

92. COAL, Inc.

93. Devon Chemicals, Inc.

94. Drew Ameroid (Deutschland) G.N.B.H.

95 Drew Ameroid (Singapore) PTE. Limited

96. Drew Ameriod Australasia PTY. Ltd.

97. Drew Ameroid France S.A.R.L.

98. Drew Ameroid International Corporation

99. Drew Ameroid Italiana S.R.L.

100. Drew Ameroid Japan Co., Ltd.

101. Drew Ameroid Nederland B.V.

102. Drew Ameroid Norge AS

103. Drew Ameroid U.K. Limited

104. Drew Chemical Corporation

105. Drew Chemical Limited

106. Drew Flocculant Corporation

107. Drew Greece Limited

108. Ecobard, Inc.

109. Equal Opportunity Finance, Inc.

110. Exaloid S.L.

111. Funding Corp. I

112. Funding Corp. II

113. Hapour, Inc.

114. Hodogaya Ashland Co., Ltd.

115. Hopsbru, Inc.

116. Hopstein Corporation

117. Iberia Ashland Chemical S.A.

118. Ig-Lo Transportation, Inc.

119. Ig-Lo, Inc.

120. Inland Towing Company

121. Instant Oil Change PTY. Ltd.

122. J. T. Trucklines, Inc.

123. Kernfest-Webac, A.B.

124. Lexington Coating Technology, Inc.

125. LHJ Holdings APS

126. Louisville Refining Co.

127. Mac's Oil & Chemicals, Inc.

128. Mid-Valley Supply Co.

129. Millwiss, Inc.

130. Mineer, Inc.

131. N. V. Drew Ameroid Belgium S.A.

132. Nettles, Inc.

133. Ohio River Pipe Line Company

134. Pine Bru, Inc.

135. Pipeline Holding Company, Inc.

136. Pipeline Leasing, Inc.

137. Properties Worldwide, Inc.

138. RCT Co., Inc.

139. Reeb, Inc.

140. Reg X Condor, Inc.

141. Relocation Properties Management, Inc.

142. Rhinebru, Inc.

143. Rich Oil, Inc.

144. Schooner Bur, Inc.

145. Scurlock Permian Corporation

146. Scurlock Permian Holdings, Inc.

147. Scurlock Permian International, Inc.

148. Scurlock Permian Pipe Line Corporation

149. Scurlock Permian Producers, Inc.

150. Scurlock Permian Trading, Inc.

151. Shelfcorp Four, Inc.

152. Shelfcorp Three, Inc.

153. Shelfcorp Two, Inc.

154. Southeastern Acquisition, Inc.

155. Southwest Land & Development Co., Inc.

156. Steinbru, Inc.

157. Superamerica Group, Inc.

158. Superamerica Kitchens, Inc.

159. Superamerica of Florida, Inc.

160. SWL Realty, Inc.

161. Tanner Companies United Metro Materials, Inc., The

162. Tanner Companies, The

163. Tanner Land Company, Inc.

164. Tanner Southwest, Inc.

165. Tap-Co, Inc.

166. Tercath Corporation

167. Thorough Bru, Inc.

168. Transport Supply Company, Inc.

169. Tri-State Marketing Services, Inc.

170. Tru Bru, Inc.

171. Unenco Foundry Products Limited

172. Valpet - Valvoline Produtos De Petroleo LTDA

173. Valvoline (Australia) PTY. Ltd.

174. Valvoline Canada Ltd./Valvoline Canada LTEE

175. Valvoline Instant Oil Change Franchising, Inc.

176. Valvoline Instant Oil Change, Inc.

177. Valvoline International, Inc.

178. Valvoline Nordisk Biltjeneste APS

179. Valvoline Oil AS

180. Valvoline Oil Company Limited

181. Valvoline Oil Nederland B.V.

182. Valvoline Sweden Aktiebolag

183. Valvoline, Inc.

184. VIOC Funding, Inc.

185. VIOC Properties, Inc.

186. Warren Brothers Hauling, Inc.

187. Webachen OY

188. Western Equipment Co.

189. Western Special Products Co., Inc.

190. Wheat Bru, Inc.

191. 1409 Corporation

192. 565 Corporation

STATEMENT OF THE CASE

The plaintiffs, Rex Allen Jernigan and Rose B. Jernigan, filed their initial lawsuit in this matter on December 11, 1989 against Ashland Oil, Inc. and Ashland Pipe Line Company (hereinafter sometimes collectively referred to as "Ashland") in the United States District Court for the Eastern District of Louisiana. Thereafter, on January 18, 1990, the plaintiffs filed a separate lawsuit in the Twelfth Judicial District Court, Avoyelles Parish, Louisiana, against Ashland and Drilled Crossings, Inc. The plaintiffs subsequently amended their state court suit on January 26, 1990 to add Baker Pipeline, Inc., Theta II Enterprises, Inc. and Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. as defendants.

With regard to service, Theta II Enterprises, Inc. was served with the plaintiffs' original and amended petitions on January 29, 1990. (R. 103). Service was attempted, but not made, upon Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. (R. 106). Drilled Crossings, Inc. was served on February 7, 1990. (R. 105). Ashland Oil, Inc. was served on February 2, 1990 (R. 107), and Ashland Pipe Line Company was served on February 28, 1990. (R. 118). No corporation exists under the name "Baker Pipeline, Inc."

Answers to the plaintiffs' original and amended petitions were filed by Theta II Enterprises, Inc. on February 15, 1990. On March 26, 1990, Drilled Crossings, Inc. filed its answer to the plaintiffs' original and amended petitions. Ashland Oil, Inc. and Ashland Pipe Line Company filed a joint

extension of time to answer the original and supplemental petitions on February 14, 1990. (Ashland Pipe Line Company was not served until February 28, 1990).

Ashland Oil, Inc. and Ashland Pipe Line Company filed a Notice of Removal in the United States District Court for the Western District of Louisiana on March 30, 1990, which effectively removed the plaintiffs' state court action to the United States District Court for the Western District of Louisiana. (R. 1). The basis of Ashland's removal was that all non-diverse defendants (defendants other than Ashland) were either intentionally added to defeat diversity or inadvertently added as defendants, despite the fact that the plaintiffs had no cause or right of action against them since the claims against those defendants were barred by the exclusive remedy

provision of the Louisiana Workers' Compensation Act (LSA-R.S. 23:1032).

On April 30, 1990, the plaintiffs filed a Motion to Remand, which was denied by the District Court on August 7, 1990. The plaintiffs subsequently filed a Motion for Reconsideration which was denied on December 5, 1990.

Thereafter, Ashland Oil, Inc., Ashland Pipe Line Company, Drilled Crossings, Inc. and Theta II Enterprises, Inc. filed motions for summary judgment on the issue of liability. Ashland's motions for summary judgment were granted on December 18, 1991. The motion for summary judgment filed on behalf of Drilled Crossings, Inc. was granted on February 26, 1991, and the motion for summary judgment

filed on behalf of Theta II Enterprises, Inc. was granted on December 16, 1991.

The plaintiffs then filed an appeal with the United States Court of Appeals for the Fifth Circuit on grounds that the alleged fraudulently joined defendants failed to join in the notice of removal, thereby rendering the removal defective. The United States Court of Appeals for the Fifth Circuit held that Ashland's removal was proper and that Ashland was not required to obtain consent to remove from the alleged fraudulently joined co-defendants before removing the case. The plaintiffs thereafter filed the currently pending petition for writ of certiorari with this Honorable Court.

ARGUMENT

Petitioners argue that the removal of this case was improper on grounds that the fraudulently and/or improperly named defendants did not join in the notice of removal filed by Ashland. As previously recognized by the United States District Court for the Western District of Louisiana and the United States Court of Appeals for the Fifth Circuit, the petitioners' argument is wholly without merit. Also, as decided by the Court in Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875 (1st Cir. 1983), a fraudulently joined party need not join in a removal petition and should be disregarded in determining diversity of citizenship.

From its inception, the only "real" defendant in this case was Ashland. As

previously indicated, the petitioners filed suit against Ashland Oil, Inc., Ashland Pipe Line Company, Theta II Enterprises, Inc., Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. and Baker Pipeline, Inc. Petitioners alleged that Rex Allen Jernigan was an employee of Theta II Enterprises, Inc., and/or Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. and/or Baker Pipeline, Inc. (R. 12). Petitioners' allegations against Theta II Enterprises, Inc., Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. and Baker Pipeline, Inc. were that these three defendants were his employer and that they were negligent. Clearly, the petitioners' claims against those three defendants were barred by the exclusive remedy provisions of Louisiana Workers' Compensation Law. Also, there is no corporate entity existing as "Baker Pipeline, Inc." and

therefore, the petitioners can have no claims against a non-existing entity. Drilled Crossings, Inc. was the statutory employer of Rex Allen Jernigan and therefore, like Theta II Enterprises, Inc. and Baker Pipeline, a subsidiary of Theta II Enterprises, is immune from the plaintiffs' claims in accordance with Louisiana Workers' Compensation Law. Therefore, based upon the above, the only potentially viable claims of the petitioners were those asserted against Ashland, since the petitioners' claims against their employers were barred and the claims against the non-entity were simply without merit. As such, all defendants other than Ashland were improperly and/or fraudulently joined by the plaintiffs and therefore, their citizenship was properly disregard for purposes of determining diversity jurisdiction. Petitioners do not dispute that diversity of

citizenship exists between Ashland and the petitioners.

Once the case was removed, Ashland had the burden of proving that the United States District Court had jurisdiction to hear the claim. Dodson v. Spiliada Maritime Corporation, 951 F.2d 40 (5th Cir. 1992). As will be shown below, that burden was clearly met by Ashland as it proved, as a matter of law, that the petitioners could not establish a cause of action against any of the Louisiana corporations named as defendants.

With regard to Baker Pipeline, Inc., Ashland produced the the deposition of James R. Baker, Jr. (R. 450-451), which showed that Baker Pipe Line, Inc. was a Texas corporation which was dissolved on September 19, 1988. Attached to the deposition of Mr. Baker are

documents from the State of Texas indicating that Baker Pipe Line, Inc. had been incorporated on August 25, 1986 and was dissolved on September 19, 1988, which dissolution occurred approximately five (5) months prior to the petitioner's alleged accident. (R. 473). Thus, Ashland showed that Baker Pipe Line, Inc. is a fraudulently joined defendant in this matter which should be disregarded for all purposes and specifically, for purposes of removal.

With regard to the other defendants, Theta II Enterprises, Inc. and Baker Pipe Line, a subsidiary of Theta II Enterprises, Inc. Ashland again produced the deposition of James R. Baker, Jr. wherein Mr. Baker appeared as the authorized representative of Theta II Enterprises, Inc. Mr. Baker testified that Baker Pipe Line is nothing more than an

unincorporated division of Theta II Enterprises, Inc. The precise relationship between the Baker Pipe Line division and Theta II Enterprises, Inc. was explained by Mr. Baker as follows:

> Q: Let me ask you this. There has been some discussion about Baker Pipe Line being a subsidiary or --
>
> A: We have -- to make this perfectly clear, we have an operating company called Baker Pipe Line. It is not a separate legal entity. It is not represented as a separate legal entity. Here is a company brochure. It says "Baker Pipe Line" to get the Baker name out this.
>
> And this was set up when Ralph Baker came to work for Theta II, in June, 1988, so that we could get my name and his name. People know in the industry as Baker out in front. And primarily it's Baker Pipe Line, a Theta II company. This is one of the company brochures.

(Deposition of James R. Baker, Jr., at pages 10-11, R. 455-456).

> Q: ...as I understand it, the Baker Pipe Line that signed the contract with Drilled Crossings for the Ashland job is not a corporation.

A: That is correct.

Q: It is not a partnership.

A: That is correct.

Q: It has no legal basis to exist other than as Theta II Enterprises.

A: That is correct.

Q: It is an unincorporated division of Theta II Enterprises.

A: That is correct.

(Deposition of James R. Baker, Jr. at pages 21-22, R. 459-460).

Additionally, at pages 34 and 35 of his deposition, Mr. Baker went on to explain that since Baker Pipe Line is essentially Theta II Enterprises, Inc., any employees working for Baker Pipe Line were in fact employees of Theta II Enterprises, Inc. and no one else. (R. 463-464). Mr. Baker further noted that Theta II Enterprises, Inc. had been the sole provider of Rex Jernigan's group health insurance and wages since July 6, 1988.

(Deposition of James R. Baker, p. 35, R. 464). This testimony clearly established that petitioner, Rex Allen Jernigan, was employed by Theta II Enterprises, Inc. and/or Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. This fact was also admitted by petitioners in their First Supplemental and Amending Petition. (R. 12). Thus, inasmuch as Rex Jernigan was employed by Theta II Enterprises, Inc. at the time of his alleged accident, Theta II Enterprises, Inc. and/or Baker Pipe Line, a subsidiary of Theta II Enterprises, Inc. are immune from suit in this matter pursuant to LSA-R.S. 23:1032(A)(1)(a) which provides that:

> **The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or**

> relations, against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.

Additionally, LSA-R.S. 23:1032(A)(1)(b) provides that:

> This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal, or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.

Thus, inasmuch as petitioner, Rex Allen Jernigan, was employed by Theta II Enterprises, Inc. and/or Baker Pipeline, a subsidiary of Theta II Enterprises, Inc., those entities are immune from the claims of the petitioners and are therefore fraudulently and/or improperly joined defendants.

Under the statutory scheme cited above, a principal contractor is also immune from suit by the employee of a subcontractor. Guillory v. Bill Decote, 509 So.2d 455 (La. App. 3rd Cir. 1987), writ denied, 510 So.2d 376 (La. 1987). By way of the following, Ashland showed that this immunity applied to Drilled Crossings, Inc. At the time of Rex Jernigan's alleged accident, there was in effect a subcontract agreement for labor and materials dated January 6, 1989 which had been entered into by Drilled Crossings, Inc. and Theta II Enterprises. (R. 465-467). In discussing the January 6, 1989 contract between Theta II Enterprises, Inc. and Drilled Crossings, Inc., James R. Baker, Jr. explained in his deposition as follows:

> Q: **And if you notice the signature of paragraph on the left-hand side of the last page of the contract which we have marked as Number 7 it says "Baker Pipe Line."**

A: That's correct.

Q: Is that the Baker Pipe Line that is the unincorporated division of Theta II Enterprises, Inc.--

A: Yes, it is.

Q: --that Mr. Jerry Baker signed on behalf of ?

A: Yes, it is.

Q: So it was Theta II Enterprises that was entering into this contract with Drilled Crossings.

A: That's correct.

(Deposition of James R. Baker, Jr. at pp. 25 and 26, R. 461-462).

Based upon the above, Drilled Crossings was Rex Jernigan's statutory employer for purposes of the instant litigation due to the fact that Drilled Crossings, Inc. had contracted with Ashland to construct Ashland's pipeline crossing, and then Drilled Crossings, Inc. subcontracted with Theta II Enterprises, Inc. to perform some of the work which Drilled

Crossings, Inc. had agreed to perform under its contract with Ashland. In other words, the general contractor, Drilled Crossings, Inc., hired Theta II Enterprises, Inc. to perform a portion of the work on the Ashland pipeline project. The work which Theta II Enterprises, Inc. contracted to perform clearly constitutes a part of the work which the general contractor, Drilled Crossings, Inc., had contracted to perform under its contract with Ashland. Therefore, under the "two contract theory", Drilled Crossings, Inc. was the statutory employer of the plaintiff, Rex Jernigan, and is therefore immune from the claims asserted against it in this matter. Bradford v. Village Insurance Company, 548 So.2d 106 (La. App. 2nd Cir. 1989); Massey v. Century Ready Mix Corp., 552 So.2d 565 (La. App. 2nd Cir. 1989); Juris v. Llama Drilling Company, Inc., 457 So.2d 135 (La. App. 2nd

Cir. 1984); writ denied, 460 So.2d 1045 (La. 1984). These authorities were uncontested by the petitioners who conceded in their Memorandum in Support of Motion for Reconsideration of plaintiffs' Motion to Remand (R. 392) that if Theta II had a contract with Drilled Crossings, Inc. before the accident, they may not recover from Drilled Crossings, Inc. as a matter of law. As indicated above, Theta II did in fact have a contract with Drilled Crossings, Inc., and therefore, the petitioners had no right of recovery against Drilled Crossings, Inc. in this case and therefore, Ashland proved that Drilled Crossings, Inc. was a fraudulently and/or improperly joined defendant.

In order for the citizenship of parties to be considered for the basis of diversity,

the plaintiffs must have stated a cause of action and must in fact have a cause of action against them. Wright, Miller & Cooper, Federal Practice & Procedure Volume 14(A) §3723 (1985); Hensgens v. Deere & Company, 833 F.2d 1179, 1181 (5th Cir. 1987). In a case such as this where a plaintiff has joined his employer and his statutory employer, neither of which can have liability because of the exclusive remedy provisions of the Louisiana Worker's Compensation Act and against neither of which plaintiff has stated a cause of action, then their citizenship should not be taken into account for purposes of diversity in a removal action. Hensgens v. Deere & Company, supra; Cook v. Pep Boys, 641 F.Supp. 43 (E.D. La. 1985); Wright, Miller & Cooper, Federal Practice & Procedure Volume 14(A) §1323 (1985).

Since Ashland was the only defendant that the petitioners had a potential cause of action against in this matter, Ashland properly filed its notice of removal showing that the other entities named as defendants were not proper parties and had been joined solely for the purpose of defeating diversity. The fact that the fraudulently joined defendants did not join in the notice of removal cannot serve to defeat removal. Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875 (1st Cir. 1983); 1A J. Moore, Moores Federal Practice §§0.161[1-1] at nn. 23 & 25, 0.161[2], 0.168[3-2-2].

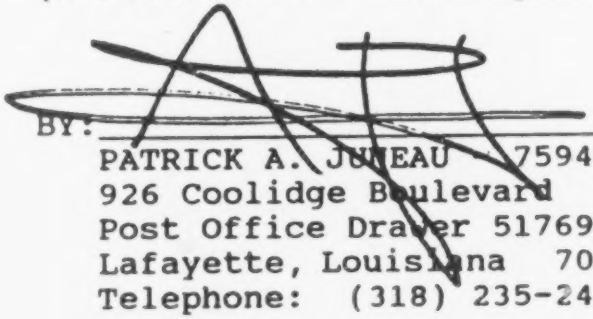
CONCLUSION

For all of the above and foregoing reasons, respondents, Ashland Oil, Inc, Ashland Pipe Line Company and Drilled

Crossings, Inc., respectfully submit that this case was properly removed from the Twelfth Judicial District Court for the Parish of Avoyelles, Louisiana to the United States District Court for the Western District of Louisiana, that the United States District Court and United States Court of Appeals for the Fifth Circuit properly held that the fraudulently joined defendants in this matter were not required to join in the notice of removal, and therefore, this case should not be reviewed by this Honorable Court.

Respectfully Submitted,

JUNEAU, JUDICE, HILL & ADLEY
(A Professional Law Corporation)



BY: _____

PATRICK A. JUNEAU - 7594
926 Coolidge Boulevard
Post Office Drawer 51769
Lafayette, Louisiana 70505-1769
Telephone: (318) 235-2405

COUNSEL FOR
DEFENDANTS/RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the above and foregoing Original Brief in Opposition has been forwarded to the following parties by U. S. Mail, postage prepaid and properly addressed: Mr. Joseph J. Weigand, Jr., Post Office Box 6062, Houma, Louisiana 70361, Mr. Glenn G. Goodier, 201 St. Charles Avenue, New Orleans, Louisiana 70170-8000 and Mr. Thomas K. Brocato, Post Office Box 6118, Alexandria, Louisiana 71307-6118.

Lafayette, Louisiana on this the 27th day of August, 1993.

PATRICK A. JUNEAU - 7594